



SEGALE PROPERTIES

A LIMITED LIABILITY COMPANY

COMMERCIAL • INDUSTRIAL • AGRICULTURAL • NATURAL RESOURCES

October 15, 2010

Department of Ecology
3190 160th Avenue SE
Bellevue, Washington 98008-5452
Attn: David Radabaugh

RE: City of Tukwila Shoreline Master Program

Dear Mr. Radabaugh:

On behalf of Segale Properties LLC f/k/a "La Pianta LLC" ("Segale Properties"), this letter contains our comments to the proposed Shoreline Master Program ("SMP") for the City of Tukwila ("City"). Segale Properties has previously submitted a number of comments to the City of Tukwila concerning the proposed SMP, and we renew our previously stated objections to the extent they have not already been addressed. With respect to the Department of Ecology's ("Department") role in reviewing the proposed SMP pursuant to RCW 90.58.090, Segale Properties has the following comments:

1. Width of the "No-Build" Buffer

From the current "no-build"¹ buffer of 40 to 50 feet measured from the mean high water mark, the City is proposing to expand the "no-build" buffer in the "leveed" areas of the Urban Conservancy zone to 125 feet from the ordinary high water mark. The size of the buffer is based upon fitting within this area a levee that achieves an overall slope of 2.5:1.0 (horizontal to vertical slope), including a 15 foot mid-slope bench, an 18 foot levee top, and an additional 10 foot no-build area along the backside of the levee.² The City's stated justification³ for the vast increase in buffer size is to "[a]llow room for Levee

¹ As used in the proposed SMP, the "no-build" buffer refers to the "Urban Conservancy Environment Buffer," in which zone the number of permitted uses are minimal, and do not include the construction of commercial structures. See SMP, §8.3(A).

² See, SMP, §7.7, pge 67.

³ Although the City first relied upon public safety concerns as the primary justification for increasing the size of the "no-build" buffer, the City also attempted to provide an *ad hoc* explanation that the SMP should provide the same level of protection as the Sensitive Areas Ordinance. After reciting the benefits of buffers, the City arbitrarily adopts 100 feet as the "starting point for considering buffer widths." SMP, §7.5(c), pge 62. However, the City failed to provide any scientific study that establishes the need for a buffer width of this size to "provide a level of protection to critical areas ... that is at least equal to that provided by the local government's critical area regulations..." WAC 173-26-221(2)(a)(ii). Segale Properties submitted a report by Andy Kindig, Ph.D., wherein Dr. Kindig concluded that levees act as "...a barrier to transmission of functions from the upland side of the levee to the river side of the levee." *Correspondence*, from Dr. Andy Kindig, dated October 16, 2008. The City failed to realize that "... 'level of protection' does not equate to 'width of buffer.'" *Correspondence*, from Dr. Andy Kindig, dated January 13, 2009. Dr. Kindig's "... overall conclusion is that if best available science is employed with the goal of

repair or replacement,”⁴ and the design of the levee is intended to “minimize the impact to the abutting property owners and reduce the need for continual repairs.”⁵ Although it is unclear how vastly expanding the size of the no-build buffer “minimizes the impact” to Segale Properties, the City has further explained that:

“[t]he paramount criteria [] has been to provide for:

- 1. Public Safety;*
- 2. Maintaining levee certification*
- 3. Solutions that eliminate or correct factors that have caused or contributed to the need for levee repair;*
- 4. Levee maintenance needs; and*
- 5. Environmental considerations.”⁶*

Segale Properties acknowledges that public safety is a critical concern, but Segale Properties believes that the increase in size of the “no-build” buffer is in violation of federal and state constitutional limitations, and accordingly inconsistent with the policies of the Shoreline Management Act, RCW 90.58.

The existing levees along the Green River do not meet the requirements of the City’s preferred levee profile, which are intended to do the following: (1) increase the safety factor against levee failure, (2) create and enhance river habitat, (3) broaden the existing top of the levee for maintenance and trails that meet the City’s Walk and Roll Plan, and (4) provide an access area along the backside of the levee so that the City can inspect the levee. Rather than taking through eminent domain the property for the above-described purposes, the City has instead elected to impose regulations intended to prohibit any commercial use of the property, keeping the area clear for future improvements to the public infrastructure along the river. Although the City has stated that it would compensate private property owners for any additional levee easements needed along the shoreline, Segale Properties finds that acknowledgement to be of little comfort.⁷ Under the federal and state constitutions, the City would be required to pay Segale Properties “just compensation” for any property taken through eminent domain.⁸ Left unsaid by the City in its acknowledgement is the legal principle that just compensation is based upon the fair market value of the taken property, and property

identifying suitable buffers for the Green River where 205 and non-205 levees exist, then the buffers do not need to extend beyond the levees themselves.” *Correspondence*, from Dr. Andy Kindig, dated October 16, 2008.

⁴ *Supra*, Footnote 3.

⁵ *Id.*

⁶ *Id.* Segale Properties notes that the City has failed to include in the aforementioned list of criteria the rights of private property owners.

⁷ Notes, Planning Commission work session held on October 15, 2008.

⁸ See U.S. Const. Amend. V; WA Const. Art. 1, §16.

that is subject to regulation prohibiting any meaningful type of development is, for all intents and purposes, worthless.⁹

The implementation of the Shoreline Management Act by the City is subject to the limitations of the federal and state constitutions.¹⁰ The City has gone to great lengths to assert that the increased buffers are needed for the purposes of "public safety," which is not one of the enumerated policies of the Shoreline Management Act.¹¹ Although Segale Properties recognizes that RCW 90.58.100 requires the City to "... give[] consideration to the statewide interest in the prevention and minimization of flood damages..."¹² the Shoreline Management Act does not grant the City authority to accomplish all of its goals and policies solely through regulation.¹³ Furthermore, the Attorney General has cautioned that "[i]f regulation or regulatory actions act more to provide a public benefit than to prevent a public harm, it should be evaluated using the takings analysis..."¹⁴

Although Segale Properties does not believe that the City needs to revise all of the existing levees to meet the preferred levee profile, the City establishes more effectively than Segale Properties could argue that the "no-build" buffers are intended to accomplish a "public benefit." The City has provided very detailed engineering conclusions¹⁵ that the levees should be laid back to the preferred levee profile for the purpose of protecting the public from the dangers of flooding along the Green River.¹⁶

⁹ The importance of the City's strategy is made clear in that certain Informational Memorandum to Mayor Haggerton from the Public Works Director, dated September 8, 2010, wherein the City describes the cost of acquiring the necessary easements for levee repairs meeting the preferred levee profile for a mere (approximately) 800 lineal feet along the Green River. For the additional levee easements, King County and the City were required to pay an appraised cost of \$343,000 plus an additional \$72,972 in interest. If that land had been subject to the proposed SMP, the cost of the additional easements would have been significantly reduced. See, generally, *Correspondence*, from Matthew Gardner, Gardner Economics, dated July 10, 2009.

¹⁰ *Biggers v. Bainbridge Island*, 162 Wn.2d 683, 693-694, 169 P.3d 14 (2007)

¹¹ RCW 90.58.020.

¹² RCW 90.58.100(1)(h).

¹³ "The policy goals of the act, implemented by the planning policies of master programs, may not be achievable by development regulation alone. ... Local government should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights..."

WAC 173-26-186(5).

¹⁴ See "State of Washington, Attorney General's Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property," pge 15.

¹⁵ See SMP, §7.7, pge 7.5, pges 60 – 62.

¹⁶ Segale Properties notes that certain elements of the preferred levee profile, namely the 15 foot mid-slope bench, the increased levee top width and the 10 foot access area on the backside of the levee, do not impact or add to the safety factor of the levee, and Segale Properties renews its objections to these elements as the basis of the increased buffer size. The City has not made a finding that these elements are needed elements to increase the safety of the levee.

In addition, the increased levee profile will benefit and enhance the river habitat, which also is a "public benefit." The fact that the SMP will not accomplish a direct taking of land is immaterial, and the Department's assertion that the SMP does not take all of the economically viable uses of the affected property is hardly conclusive.¹⁷ Regulatory takings are not so easily dismissed. The City has failed to heed the Attorney General, who has instructed that local governments should:

consider whether there is any substantial similarity between a proposed regulatory action and the traditional exercise of the power to condemn property. When government regulation has the effect of appropriating private property for a public benefit rather than to prevent harm, it may be the functional equivalent of the exercise of eminent domain.¹⁸ (emphasis added)

By eliminating the value of the property affected by the "no-build" buffer, the City will be able to purchase the land needed in the future to reconstruct the levees along the shoreline for a *de minimis* amount. Taking a regulatory action that devalues land that the City intends to acquire in the future is called "pre-condemnation blight," and it is unconstitutional.¹⁹

For the reasons stated above, the Department must cause the City to revise the "no-build" buffer proposed for the leveed portions of the Urban Conservancy zone to comply with federal and state constitutional limitations and the policies of the Shoreline Management Act. In addition, Segale Properties believes that the City will also be liable for a claim of damages arising from an as-applied regulatory taking if and when the City seeks to acquire levee easements from Segale Properties for public improvements along the river.

2. Height Limitations Can Only Be Imposed to Protect Residential Views.

Under Section 9.3(c) of the SMP, the City proposes to restrict the height of all buildings along the shoreline to a height of 45 feet from the "outside landward edge of the River Buffer and 200' of the OHWM." The Shoreline Management Act provides that the height of structures within the shoreline may be limited to 35 feet, but the legislature qualified the restriction as follows:

¹⁷ "Frequently Asked Questions – Shoreland and Environmental Assistance," Department of Ecology, revised April 2010

¹⁸ *Supra.*, footnote 14 at page 9.

¹⁹ See, e.g., *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 373 n.2 (9th Cir. 1981); *Oceanic California, Inc. v. City of San Jose*, 497 F. Supp. 962, 973 (N.D. Cal. 1980); *Washington Metro. Area Transit Auth. v. One Parcel of Land*, 413 F. Supp. 102, 106-07 (D. Md. 1976), *aff'd.*, 548 F.2d 1130 (4th Cir. 1977); *Robertson v. City of Salem*, 191 F. Supp. 604, 611 (D. Or. 1961); *Carl M. Freeman Assocs., Inc. v. State Roads Comm'n*, 252 Md. 319, 329, 250 A.2d 250, 255 (1969); *Grand Trunk W. R.R. Co. v. City of Detroit*, 326 Mich. 387, 399-400, 40 N.W.2d 195, 200 (1949).

No permit shall be issued pursuant to this chapter for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.²⁰
(emphasis added)

Furthermore, the Department repeated that condition in its regulation that requires the City to "[a]dopt provisions, such as maximum height limits, setbacks, and view corridors, to minimize the impacts to existing views from public property or substantial numbers of residences."²¹ (emphasis added). Accordingly, the necessary condition precedent under the Shoreline Management Act that must be satisfied before the City may restrict building heights along the shoreline is the need to determine whether views from residences or public property will be obstructed. However, Segale Properties is not aware of any study or report made by the City, and no such finding is in the record, that such views would be obstructed by buildings that exceed 45 feet in height. Unless such finding is first made, the City is without authority to impose the proposed height restrictions. The Department must direct the City to justify the height limitation by commissioning a study to determine whether any existing views from public property or residential views would be impacted by shoreline development exceeding 45 feet in height.

Thank you for your consideration of these comments.

Sincerely,

SEGALE PROPERTIES LLC



Jacek Pawlicki

²⁰ RCW 90.58.320.


²¹ WAC 173-26-221(4)(d)(iv).



Jim Haggerton, Mayor

INFORMATIONAL MEMORANDUM

TO: Mayor Haggerton

FROM: Public Works Director 

DATE: September 8, 2010

SUBJECT: Tukwila 205 Levee Repair – Lily Pointe, LLC (Amended after UC)
Project No. 08-DR02
Purchase and Sale Agreement - Easement Interest Payment Approval

ISSUE

Approve Real Estate Purchase and Sale agreement easement interest payment to Lily Pointe, LLC for the Tukwila 205 Levee Repair project.

BACKGROUND

The US Army Corps of Engineers completed repairs to the Tukwila 205 Levee in 2008. These repairs required additional easement widths to allow for laying the levee slopes back to provide a more stable river bank. The City of Tukwila is responsible (under an agreement with the US Army Corps of Engineers) to provide all easements necessary for the construction and maintenance of the levee. City staff worked with the two affected property owners to secure Possession and Use Agreements that allowed the repair project to move forward quickly and avoid losing federal repair funding. The agreement with Lily Pointe, LLC, called for the City to reimburse the property owner for the value of the easement plus 12% interest per year from the date of possession until payment. The King County Flood Control District (District) has committed to reimbursing the City for the actual cost of the easement but did not commit to the interest payment. Since completion of the Possession and Use Agreement, it has taken over two years to finish the site survey, appraisal, easement funding approval through the District, and final easement negotiations through the Corps, District, Lily Pointe, and the City.

ANALYSIS

An appraisal has been completed and Lily Pointe has accepted the appraised value of \$343,000. The District is working with a closing agent to complete the transaction and record the easement. Staff contacted Lily Pointe and explained that the City is required to pay the interest portion of the easement cost and with the financial hardship the City is currently facing, asked if they would be willing to reduce the 12% interest rate. After careful consideration, Lily Pointe agreed to reduce the interest rate to 9% provided we can close the transaction by November 15, 2010. Using this reduced rate, the City will need to provide approximately \$75,000.00 in interest with the final cost determined with the closing date.

Staff has reviewed options for funding the interest payment and it is recommended that the 412 Surface Water fund be used and then reimbursed using the City's share of the District's Annual Opportunity Fund over then next several grant cycles. Funding is anticipated at \$44,000.00 each year and may be used for any flood related project. These Opportunity funds are currently programmed in the Annual Small Drainage Program.

RECOMMENDATION

The Council is being asked to approve the real estate purchase and sale agreement and funding for the interest portion of this easement acquisition in an amount not to exceed \$75,000.00 and consider this item at the September 13, 2010 Committee of the Whole meeting and subsequent September 20, 2010 Regular Meeting.

Attachments: Real Estate Purchase and Sale Agreement
Lily Pointe Amendment to Possession and Use Agreement – Revised
Lily Pointe Possession and Use Agreement